



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 14, 2003

Mr. Jason Martinson
Open Records Coordinator
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744-3291

OR2003-2513

Dear Mr. Martinson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179338.

The Texas Parks and Wildlife Department (the "department") received a request for four categories of information pertaining to grass carp permitting and federal funding. You state that some responsive information has been released to the requestor. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.111, 552.116, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that a portion of the information you have submitted to us for review is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2003-2374 (2003), we concluded that the submitted information was not excepted from public disclosure and must be released to the requestor. Therefore, the department must release that portion of the submitted information previously ruled upon in

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Open Records Letter No. 2003-2374 (2003).² See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). To the extent that the remaining submitted information was not the subject of the ruling in Open Records Letter No. 2003-2374 (2003), we will address your arguments.

We note that the submitted records contain information that is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted documents include information in vouchers relating to the receipt of funds by a governmental body, which are subject to section 552.022(a)(3). The records at issue also contain completed reports and evaluations, which must be released pursuant to section 552.022(a)(1) unless excepted from disclosure under section 552.108 of the Government Code or confidential under other law. You do not contend that the reports and evaluations are excepted from disclosure under section 552.108. Furthermore, sections 552.103, 552.111 and 552.116 are discretionary exceptions and do not constitute other law under which information is made confidential. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 473 at 2 (1987) (discretionary exceptions under predecessor to Act can be waived). Therefore, the department may not withhold the

²The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

information subject to the purview of section 552.022 of the Government Code under section 552.103, 552.111 or 552.116. You claim, however, that section 552.136 of the Government Code excepts portions of the submitted information from public disclosure. As section 552.136 is considered a confidentiality provision for the purpose of section 552.022, we will consider the application of that section to the information otherwise subject to release under section 552.022.

However, that a portion of the responsive information constitutes customer information, and thus is governed by section 11.030 of the Parks and Wildlife Code.

Section 11.030 states that:

(a) The name and address and a telephone, social security, driver's license, bank account, credit card, or charge card number of a person who purchases customer products, licenses, or services from the department may not be disclosed except as authorized under this section or Section 12.0251.

(b) Chapter 552, Government Code, does not apply to customer information described by Subsection (a).

...

(e) The commission or department may disclose customer information to a federal or state law enforcement agency if the agency provides a lawfully issued subpoena.

Parks & Wild. Code § 11.030(a). Section 12.0251 states that

(b) The commission or the department may disclose information described by this section only to the landowner unless:

(1) the landowner consents to full or specified partial disclosure of information; and

(2) the consent is in writing and is attached to the plan or recommendation report.

Parks & Wild. Code § 12.0251. We find that some of the information that is otherwise subject to release under section 552.022 of the Government Code constitutes customer information, and thus is governed by section 11.030. Because subsection (b) of section 11.030 specifically excludes "customer information" from the provisions of Chapter 552 of the Government Code, we conclude that Chapter 552 does not govern the release of such

information.³ However, section 11.030(c)(1) requires that the Parks and Wildlife Commission “by rule shall adopt policies relating to . . . the release of customer information.” Accordingly, the department must adhere to the policies adopted by the Parks and Wildlife Commission in determining the extent to which the “customer information” may be released to the requestor. For your convenience, we have marked the types of information that meet the definition of “customer information.” Section 11.030 is not applicable, however, to the remaining information which does not constitute customer information.⁴

We next address your arguments for the submitted information that is not subject to the purview of section 552.022. You claim that the remaining submitted documents in Attachments D, E-1, E-2, and F are excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the request for information was received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

³As section 11.030 specifically excludes “customer information” from the provisions of Chapter 552, we do not address your claim that section 552.101 of the Government Code excepts this information from disclosure in conjunction with section 11.030.

⁴As section 11.030 is dispositive as to bank account numbers, we do not address your section 552.136 argument for this information.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you have provided this office with a copy of a letter containing statements concerning the intent of the requestor's clients to enter into litigation regarding the plan to introduce grass carp into Lake Austin. We understand you to indicate that the department, as the permitting agency, would be a party to such litigation. You also point to the request letter itself as proof of anticipated litigation. We have reviewed these letters and your arguments and conclude, based on the totality of the circumstances, that litigation was reasonably anticipated on the date the department received the request for information. We also find that the remaining submitted information in Attachments D, E-1, E-2, and F is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that this information may be withheld from disclosure at this time pursuant to section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).⁶

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

⁶As our ruling is dispositive, we do not address your remaining arguments concerning disclosure of this portion of the submitted information.

With respect to the remaining submitted information in Attachments H-2, H-3, and H-4, we will first address your argument under section 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications;
and

(B) drafts of the audit report or portions of those drafts.

Section 552.116 is intended to protect the auditor's interests, which in this instance is the United States Fish and Wildlife Service. The submitted documents include records of the department (the auditee) that have been reviewed by the auditor and are maintained by the department. As the auditee, the department cannot assert section 552.116 in order to protect its own interest in withholding the information. As such, section 552.116 is inapplicable and does not protect these documents from disclosure.

We next address your section 552.111 argument. Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's

policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. After reviewing the remaining submitted information, we find that none of it constitutes internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the department. Therefore, you may not withhold any of this information under section 552.111. Accordingly, the entirety of the submitted information in Attachments H-2, H-3, and H-4 must be released to the requestor.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, to the extent that the submitted information is the identical information previously ruled upon in a previous ruling by this office, it must be released to the requestor. We have marked the types of information that meet the definition of "customer information" and are only subject to release pursuant to the policies adopted by the Parks and Wildlife Commission under section 11.030 of the Parks and Wildlife Code. The remaining submitted information in Attachments D, E-1, E-2, and F that has not been obtained from or provided to the opposing party in the anticipated litigation may be withheld from disclosure under section 552.103(a). The remaining submitted information must be released to the requestor. The release of any copyrighted material is subject to copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 179338

Enc. Submitted documents

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